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SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. ~~1018~~ 153

FRANK R. COPPOLA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

FRANK R. COPPOLA,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BATAVIA TIMES LAW PRINTERS,
BATAVIA, N. Y.

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your petitioner prays that writs of certiorari be issued to review the two (2) judgments of the United States Court of Appeals for the Second Circuit, dated May 20, 1960, wherein the said Court affirmed separate judgments of conviction of the District Court for the Western District of New York, entered therein on July 11, 1957 and December 30, 1957. The judgments of the District Court convicted the petitioner, Frank Coppola, of violating 18 U. S. C. § 2113 (a) and (b). On each judgment, the petitioner was sen-

tenced to 20 years' imprisonment, the second of said judgments to run consecutively.

Both appeals, at the direction of the Court of Appeals, were argued the same day.

On July 20, 1959, the Court of Appeals for the Second Circuit reversed both judgments of conviction, one Justice dissenting, and remanded both cases for a new trial (A-II-1)*. The Government applied for and secured an order granting a hearing *en banc* in both cases (A-II-44). After re-argument, before five (5) active Judges of said Court, the original reversal of said judgments was set aside and the Court affirmed the judgments of the District Court, with two (2) Judges dissenting (A-II-55 to 73).

The judgments of conviction, against petitioner, have been affirmed in both cases; the writ of certiorari herein sought in both cases is to the same court, and the identical question is raised in both cases.

Opinions Below

The District Court did not render an opinion. Copy of the opinion of the Court of Appeals, dated July 20, 1959, reversing both convictions, as well as the dissenting opinion, dated December 4, 1959, neither of which are officially reported, are hereby appended as Appendix A (pp. 16-32).

Copies of the majority and dissenting opinions, dated May 20, 1960, in both cases, neither of which are officially reported, are hereby appended as Appendix B (pp. 33-62).

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* Capital Letters refer to certified Appendix.
Roman Numerals refer to volume of certified Appendix.
Numerals refer to pages in specified volume of Appendix.
R refers to original Record; numerals in parentheses refer to certified stenographic record.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked upon the following grounds:

(i) The judgment of the Court of Appeals was dated and entered May 20, 1960.

(ii) The jurisdiction of the Court to review the judgments herein by Writs of Certiorari is conferred under Sections 1 and 2 of Article III of the Constitution of the United States; Section 1254(1) of Title 28, U. S. C.; Rules 19(1) (a) (b), 21, 22 and 23(5) of the Rules of the Supreme Court of the United States.

Question Presented

Whether, under the rule of *Anderson, et al. v. United States,* 318 U. S. 350, confessions, oral and written, obtained by Federal agents during a lengthy illegal detention, resulting from a "working agreement" between Federal and local police, were admissible in evidence.

Statutes Involved

The pertinent statutory provisions and Federal Rules of Criminal Procedure are printed in Appendix C (pp. 63-64).

Statement

First Case: M and T Bank robbery—February 15, 1956:

On February 15, 1956, the Clinton-Bailey Branch of the Manufacturers and Traders Trust Company in Buffalo, New York was held up by two men. The men escaped with approximately $52,529.00 of United States currency. This

bank was insured by the Federal Deposit Insurance Company.

On or about February 25th or 27th, 1956, the defendant Coppola was brought to the Manufacturers and Traders Trust Company by agents of the Federal Bureau of Investigation for the purpose of having the events of the holdup re-enacted. This was pursuant to a pre-arrangement between Albert J. Eger, branch manager of the Clinton-Bailey branch of the bank, and members of the F. B. I. The defendant Coppola put on a stocking mask and the F. B. I. agents gave him instructions as to what he was to do. He approached the branch bank manager, then proceeded toward the work cages, followed by F. B. I. agents; that he was back of the cages for three or four minutes and then retraced his steps to the manager's desk and then went into the hallway of the bank.

No arrest was made of the defendant after the re-enactment of the holdup, charging him with being one of the participants in the same.

On January 7, 1957, approximately eleven (11) months after the re-enactment of the holdup, John F. Roche, Special Agent of the F. B. I. in Buffalo, New York, contacted John Golombeck, Chief of Detectives of the Buffalo Police Department, as to information concerning an alleged unsolved crime outside the jurisdiction of the Federal authorities (A-I-111). Again on January 9, 1957 Agent Roche contacted Golombeck, Chief of Detectives, and relayed to him information concerning a contemplated holdup. On January 10, 1957 Agent Roche received a telephone call from Golombeck to the effect that "the defendant Coppola and others had been *arrested* and they were on their way to police headquarters with them" (A-I-112). Agent Roche informed the Erie County District Attorney, Dwyer,

of the same information on January 9, 1957 and, in addition, told the said Dwyer that the defendant was being investigated by the F. B. I. in connection with the robbery of the Manufacturers and Traders Trust Company (A-I-112, 113).

On January 10, 1957 Agent Roche went to Buffalo Police Headquarters *shortly before noon;* that he saw Chief Golombeck, District Attorney Dwyer, and Detective Klenk and had lunch with them (A-I-119); that he returned to police headquarters at 2:30 P. M. with District Attorney Dwyer and at 3:30 P. M. saw the defendant in the cell block and questioned him about the M & T bank robbery (A-I-113, 114, 120); that shortly before 9:00 P. M. on the same day he assigned Special Agents Eddy and Jenson to interview Coppola; Agents Moulin and Jenkins to interview D'Antuono, and Agents Obuhanick and Liddy to interview Simmons (A-I-115).

Agent Roche further testified that he and other F. B. I. agents were investigating the robbery of the Clinton-Bailey branch of the Manufacturers and Traders Trust Company from February 15, 1956 up to and including *January 7, 1957;* that the F. B. I. worked very closely with the Buffalo Police Department in this particular investigation (A-I-117); that if he had information they wanted to work on mutually they would assign a detective and an agent to work together on it (A-I-118).

Agent Roche expected a call from Detective Chief Golombeck if anything developed (A-I-121). That defendants, after arraignment in City Court, were turned over to Federal authorities around four (4) o'clock on January 11, 1957, and were arraigned before Commissioner Butterfield (A-I-117).

On January 10, 1957, the defendant and others were arrested and taken to police headquarters where they were lodged in cells and no charge was placed against defendant during the entire day (A-I-78, 79). On January 11, 1957 a charge was placed against the defendant at 1:00 P. M. and defendant was arraigned in the City Court of Buffalo on January 11, 1957 at approximately 2:00 P. M. There was no warrant for the arrest of the defendant prior to 2:00 P. M. on January 11, 1957. It was conceded that defendant had been arrested and held on *suspicion* from 10:00 o'clock on the morning of January 10, 1957 until ten minutes to one o'clock in the afternoon of January 11, 1957 (A-I-79, 81, 82). That at about 10:00 o'clock on January 11, 1957 the F. B. I. requested custody of defendant and others. There was no compliance with this request. After arraignment in the City Court of Buffalo the defendant was delivered into the custody of Mr. Henderson, United States Attorney (A-I-88, 89).

Detective Klenk identified Government's Exhibit 41, and the same was marked in evidence. This was the daily memoranda of arrests used in the Buffalo Police Department to record the time a person is brought in, his name, age, the charge, the arresting officers, and the final disposition (A-I-84, 85). That the time of day recorded on Exhibit 41, as to defendant Coppola, namely 3:45 P. M. and 4:15 P. M., indicated the time that the defendant was brought down the cell block and officially put on the memoranda of arrests in the afternoon of that day (A-I-92, 93).

That the charges of 2124 and 404 of the Penal Law were made on Exhibit 41 on January 11, 1957 and the designation of 3:45 and 4:15 P. M. on Exhibit 41 did not indicate the time that such charges were made against the defendant (A-I-95, 96).

Klenk further testified that on January 10, 1957, between the hours of 9:00 P. M. and 12:30 P. M., he went to the cell block to question defendant. That each time members of the F. B. I. were questioning him. That he refrained from questioning defendant because of the policy of courtesy extended to officers of the F. B. I. and other law-enforcing agencies (A-I-91).

John C. Golombeck, Chief of Detectives, Buffalo Police Department, testified that he received information from F. B. I. Agent Roche on January 7th, 9th and 10th, 1957. That on January 10, 1957 he was in a car with Detectives Klenk and Segit; that the car in which defendant was riding was directed to pull over, *on suspicion;* that no crime was being committed at that time (A-I-97, 98). That defendant and others were taken to police headquarters and to circumvent the press and the taking of pictures the defendant and others were taken to the fourth floor and placed in a cell block.

He testified that he placed a charge against Coppola on the afternoon of January 10, 1957 around 3:30 or 4:00 o'clock; that he did not make the notation on Exhibit 41 as to the time; that he was pretty sure that his relief man placed the time (A-I-100, 102).

When his attention was called to the fact that there was testimony that the time on Exhibit 41 represented the time that defendant was brought from the cell block to the detective bureau he said, "Well, then, it must be so" (A-I-103).

He called F. B. I. Agent Roche to let him know he apprehended defendant and others; that his department works hand in hand with the F. B. I. (A-I-106).

In the afternoon of January 10, 1957 he saw several F. B. I. agents in Buffalo Police Headquarters, and again at night on the same day he saw a number of F. B. I. agents there; that in the evening he couldn't interrupt the F. B. I. agents who were questioning defendant, although he remained at headquarters until 12:30 A. M. (A-I-100, 102).

Elmer F. Moulin, an F. B. I. agent, went to police headquarters in Buffalo just prior to 8:00 P. M. and was there until midnight. He was accompanied by another agent, Frank Jenkins. He saw other members of the F. B. I. there including Messrs. Eddy, Jenson, Obuhanick, Liddy and Roche (A-I-107-109).

Robert Gordon Eddy, Special Agent of the F. B. I., testified that he learned at about noon of January 10, 1957 that Coppola had been taken into custody by the Buffalo Police Department on that day. That he and Agent Jenson went to the Buffalo Police headquarters about 8:00 P. M. of the same day (A-I-7, 8); that at headquarters there were five other agents and Mr. Roche; that a show-up was in progress when he arrived; that at about 9:00 P. M. defendant was brought out and he and Agent Jenson interviewed defendant until shortly after 12:45 A. M. on January 11, 1957 (A-I-9-11). That the office wherein he questioned defendant was barricaded and he could see other agents in another room interviewing others (A-I-12); that he knew defendant was arraigned on January 11, 1957; that he did not place any charge against defendant; that he had no warrant for defendant's arrest (A-I-13-15).

Upon being recalled the next day by the Government he testified that the defendant made no complaints about lack of food or drink; he didn't say he was mentally or physi-

cally tired and didn't appear to be nervous or afraid; that the interview commenced at 9:04 P. M. and at 9:41 the defendant started to tell Agent Eddy about crimes he was involved in; that during the interview District Attorney Dwyer came into the room and also Special Agent Roche and Agent Jenkins came to the door of the room where the questioning was being conducted (A-I-27-29). At 11:37 P. M. he started the statement (Government's Exhibit 43) and at this juncture he was not again advised orally of his rights. That between 9:02 and 9:41 P. M. the agents told defendant of some of the evidence they had developed (A-I-30, 31); that they asked defendant the part that his wife and mother had in the Manufacturers and Traders Trust Company robbery and they couldn't answer his questions as to whether the agents intended to arrest his wife and mother (A-I-35); that Agent Eddy prepared the first two paragraphs of Exhibit 43 and defendant dictated the balance (A-I-38).

Agent Jenson's testimony substantially corroborated Mr. Eddy (A-I-39-46). He testified that there was a short discussion about defendant's mother and wife being involved and if he was assured that they would not be prosecuted he would sign a statement (A-I-45).

On the preliminary hearing, without the jury's presence, the petitioner testified that on January 10, 1957, at about 10:00 A. M., he was in an automobile on Clinton Street in the City of Buffalo, New York when a shotgun was pointed at him and he and others were told to "stick up their hands". He was taken to Buffalo Police Headquarters and put in a cell. He asked for food and was told, "This isn't a cafeteria, we didn't ask you to come up here." (A-I-47). He was interrogated throughout the day as well as being placed in a "lineup" on several occasions. He asked

to use the telephone, and this request was denied. He asked to call his lawyer and the response was, "Where do you think you are, in a hotel?" He was further told, "Well, we don't feed around here." Later, he gave money for food and received a tunafish sandwich which he had to throw away. They gave him milk and then took it from him. He again asked for food, at nighttime, and was told "they didn't serve meals up there" (A-I-49-51, 53).

He testified that Agent Eddy, who had interrogated him a year previously, and Jenson had him brought into the office of the cell block at police headquarters about 8:00 or 8:30 P. M. Eddy told the defendant that his mother and wife were in a Niagara Falls jail. He asked to see the United States Attorney and a Federal Judge, both of which requests were denied (A-I-55). They told the defendant several times that if he signed a statement they would recommend that the case against his mother and wife be dropped (A-I-57). Agent Eddy prepared a statement; the defendant repeatedly told him he knew of no facts (A-I-59); up to the time of signing the statement he had no food or drink. He made the statement involuntarily because he was told his mother and wife were suffering and he was advised by the F. B. I. that the only way they could be released was to give a statement (A-I-61).

On cross examination he testified that he made requests for a lawyer to Agents Eddy and Roche, Detective Chief Golombeck, Detective Klenk, the turnkey, and several other officers (A-I-66).

At the conclusion of such testimony the Court stated that it would not hold that the confession was involuntary as a matter of law, but would submit such question to the jury as a question of fact (A-I-130). Also, the Court held as a matter of law that there was no unusual delay in the ar-

arraignment of defendant (A-I-128). The Court also refused to submit the question of the unreasonableness of the delay to the jury as a question of fact (A-I-174).

Upon resumption of trial before Court and jury, Agent Eddy testified as to the conversation he had with petitioner on the evening of January 10, 1957 shortly after 9:00 P. M. and continuing until 12:54 A. M. on the following morning. He also testified as to the preparation of a statement and the signing of the same by petitioner. This statement (Exhibit 43) was received in evidence over petitioner's objection (A-I-143).

On cross examination, Agent Eddy admitted he was conversant with the details of the robbery of the M & T Trust Company since February 15, 1956; that he learned of such details from employees of the bank (A-I-146, 147, 155-159). Further, he admitted that in his conversation with petitioner he was telling petitioner of facts that he had learned from outside sources (A-I-162). He never charged petitioner with any violation relative to the robbery of the M & T Trust Company; he never demanded that petitioner be released into his custody (A-I-169).

Second Case: Liberty Bank Robbery—October 2, 1956:

On October 2, 1956 three (3) men entered the Linwood-North branch of the Liberty Bank of Buffalo and proceeded to stage a robbery of the said bank to the extent of $23,775.10 in United States currency. The men escaped with the assistance of an automobile driven by a fourth man who waited outside the bank. Between January 1, 1957 and January 10, 1957 John A. Roche, Special Agent in charge of the Buffalo office of the F. B. I., was conversant with the facts surrounding the aforesaid bank holdup on October 2, 1956 and also all the statements made in

November and December 1956 concerning such holdup, including those of William Buyers III, a deputy sheriff (896, 897) (A-I-121).

The indictment against the petitioner, *et al.*, relating to the above crime was tried approximately six (6) months subsequent to the first case.

A preliminary hearing was held by the Trial Court, without the presence of the jury, and the same members of the F. B. I. and the Buffalo police who had testified at the first trial testified on such hearing. The evidence produced was substantially the same as was produced at the first trial. Motions to suppress the oral and written admissions of petitioner on the basis of unreasonable delay in arraignment and involuntariness were denied by the Court (A-I-129, 130). The Court not only held that as a matter of law there was no delay in arraignment of petitioner, but upon request from the Government it also found *as a matter of fact* that there was no working agreement between the F. B. I. and the Buffalo police with respect to the arrest and detention of petitioner (A-I-130).

Specifications of Errors To Be Argued

I. That the Court below misinterpreted the rule in *Anderson v. United States*, 318 U. S. 350; and further erroneously distinguished the factual situation in the present cases from those in *Anderson v. United States (supra)*.

II. That the Court below erred in holding an oral or written confession admissible where such confession was obtained during an illegal detention resulting from a working arrangement between the Federal and local authorities, prior to arraignment.

III. In affirming both judgments of conviction of the District Court.

Reasons For Granting The Writ

1. The decisions of the Court below in the instant cases are in conflict with the decision rendered in *Anderson, et al. v. United States*, 318 U. S. 350.

In the latter case, the arrest of the strikers was initiated by the sheriff; the arrest in our present cases resulted from a telephone conversation from the Federal Agent-In-Charge at Buffalo to the Buffalo Police Department. The arrests in the instant cases and in the *Anderson* case were made without warrant and by local or State officers; and the admissions in both cases were obtained while the confessors were in the custody of such local or State officers. In *Anderson, et al. v. United States*, there was no evidence of collaboration between the sheriff and Federal officers *prior* to the arrest of the defendants. In the instant cases, the Federal agents admitted that *prior* to the arrest of petitioner the Buffalo police had co-operated with the Federal officers investigating the bank case; that both Federal and local officers had worked the case mutually, and that they had assigned a Federal agent and a detective to work out information in their possession (A-I-117-118). This Court held, on the record in the *Anderson* case, that there was a working agreement between Federal and State officers. The Court below, in the instant cases, in spite of the similarity of the facts in both cases concerning illegal arrest by State officers, illegal detention by such officers, violation of State statute as to arraignment, failure to arraign pursuant to Rule 5(a) of Federal Criminal Rules, plus the added factors in the present cases, *viz:*

(1) Federal agents initiated the local police action as to petitioner by a telephone call;

(2) admission by Federal agent that prior to arrest of petitioner a Federal agent and a local detective had been assigned to work out information about the case; and

(3) the call from the local police to the Federal agents that the former had arrested petitioner and was on the way to police headquarters, determined that such facts did not establish a "working agreement" between the agencies. Such a finding resulted from a misunderstanding of the principle in *Anderson, et al. v. United States* (*supra*).

2. The question presented, and the interpretation as to what constitutes a "working agreement" as enunciated in *Anderson, et al. v. United States* is of importance in the administration of criminal justice in the Federal Courts. *McNabb v. United States*, 318 U. S. 332, 340. These cases have been presented to and considered by six (6) appellate court justices. The original panel reversed the judgments of conviction by a vote of 2 to 1. After a second hearing *en banc* before five Judges (two of whom sat on the original panel), the opposite determination, *i.e.* of affirmance, was rendered by a vote of 3 to 2. Four opinions have been released and two of the same have been withdrawn by order of the Court. The eventual result is that of the six Judges who have examined the facts and applicable law of the case, three have determined that the facts measure up to the standards of evidence necessary to establish a "working arrangement" between Federal and State officers; and three Judges have enunciated the opposite view.

It would appear that there was considerable confusion or hesitancy in the mind of the sole dissenting Judge, on the original decision of reversal of the lower Court. The appeals were argued March 9, 1959; the judgment of re-

versal was entered July 20, 1959; the dissent at that time was evidenced by the statement: "I dissent in a separate opinion to be filed later." (Appendix A). Four and one-half months later, December 4, 1959, and on the same day that the lower Court granted an order for a re-hearing *en banc*, the dissenting opinion was filed. It is conceivable that reasons may exist for a delay as to the rendition of an opinion. However, it is probable as well as plausible that the majority opinion of July 20, 1959, evidenced the correct application of the principle of *Anderson, et al. v. United States*, and the four and one-half month period was a necessity in order to justify the reason for the skeleton form of dissent previously recorded.

Again it will be noted that five months and five days elapsed from the argument on the re-hearing *en banc*, December 15, 1959, and the decision of May 20, 1960. Many valid reasons may exist for such delay, but again, one of the most plausible of such reasons may be the difficulty encountered by the three Judges on the *en banc* re-hearing endeavoring to analyze whether the facts of the present cases fell within or without the reasoning of *Anderson, et al. v. United States (supra)*.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM B. MAHONEY,
Counsel for Petitioner.

June 15, 1960.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 43—October Term, 1958.

(Argued March 9, 1959 Decided July 20, 1959.)

Docket No. 25177

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK R. COPPOLA,
Defendant-Appellant,

and

DARIO D'ANTUONO, a/k/a "Danny" D'Antuono,
Defendant.

Before:

WASHINGTON, WATERMAN and MOORE,
Circuit Judges.

Defendant Coppola appeals from his conviction, after a trial by jury, on all three counts of an indictment charging violation of 18 U. S. C. §2113(a) and (b), Western District of New York, Brennan, *J.* Reversed and remanded.

LEO L. FALLON, Asst. U. S. Attorney, W. D. N. Y., Buffalo, N. Y. (John O. Henderson, U. S. Attorney, W. D. N. Y., Buffalo, N. Y., on the brief), *for Plaintiff-Appellee.*

WILLIAM B. MAHONEY, Buffalo, N. Y., *for Defendant-Appellant.*

WATERMAN, *Circuit Judge:*

The defendant, Frank R. Coppola, was convicted, after a trial by jury in the Western District of New York, on all three counts of an indictment charging violations of 18 U. S. C. § 2113(a) and (b). The first count alleged that defendant by force, violence and intimidation, took approximately $52,529.00 from a Buffalo, New York branch of the Manufacturers and Traders Trust Co., said company being a member of the Federal Reserve System; the second count charged defendant with entering that bank with intent to commit larceny; and the third count charged him with taking and carrying away from that bank, with intent to steal, the sum of approximately $52,529.00. Defendant's sole contention on this appeal is that admissions by him, oral and written, were improperly allowed into evidence. As a result of those claimed errors, he seeks a new trial.

The facts necessary for a determination of this question follow. On February 15, 1956 the Clinton-Bailey Branch, in Buffalo, New York, of the Manufacturers and Traders Trust Co. was held up and robbed by two masked men. The defendant was a suspect as early as February 20, 1956, five days after the robbery, but no arrest was made. Subsequent to that time the FBI received the aid of a confidant of defendant. As a result of that aid the FBI came to believe that defendant was responsible for an unrelated crime, a robbery of a local butcher; and John A. Roche, Special Agent in Charge of the FBI in Buffalo, communicated that belief to John Golombeck, the City of Buffalo

Chief of Detectives, on January 7, 1957. By means of photographs of defendant supplied by the FBI to the

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city police the butcher identified defendant. On January 9, 1957 Roche again contacted Golombeck and informed him that defendant and two others were planning to rob a tavern in East Buffalo the following day. Roche then communicated the same information to the County District Attorney, and told him that defendant was also a suspect in a bank robbery. About 9:30 A. M. on January 10, 1957 Golombeck with two other Buffalo policemen arrested defendant and two of his companions. Golombeck then telephoned Roche that defendant had been arrested and was being taken to police headquarters. That afternoon when defendant was being interrogated by the County District Attorney, Roche was present. He questioned defendant briefly about his connection with the Manufacturers and Traders Trust Co. robbery. That evening two FBI agents, acting on orders from Roche, went to police headquarters, and there questioned defendant in his cell from 9:00 P. M. until about 12:45 A. M. on January 11. It was during this period that defendant made the incriminating statements involving him in the February 15, 1956 bank hold-up. These statements were then reduced to writing. Thereafter at 11:00 A. M. on January 11, 1957, the FBI requested that defendant be turned over to them. However, the federal officers did not obtain custody of Coppola until about 4:00 P. M. on that day. In the meantime, after the FBI request, at about 2:00 P. M. that day defendant was arraigned in the City Court of Buffalo. This was the first time he had been brought before any magistrate after he had been picked up at mid-morning of the previous day. After he was turned over to the FBI he was promptly ar-

raigned before a United States Commissioner. Although Roche and the local police testified to a spirit of cooperation between their respective law enforcement departments, they denied that defendant was arrested by the police officers at the FBI's request. Defendant made a timely motion

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at the trial to suppress all evidence of his admissions. After a hearing out of the jury's presence the district court denied the motion to suppress. He held that, as a matter of law, there "was no unusual delay" of a nature that should foreclose the introduction of the evidence of the Government concerning the defendant's incriminating statements made to the federal agents while he was held by the Buffalo police.

If federal officers had picked up the defendant and had incarcerated him from approximately 9:30 A. M. on January 10, 1957 until after midnight that night and during that time had interrogated him to the extent of the interrogation here, there would seem to be little doubt that his detention would have been in violation of Rule 5(a) of the Federal Rules of Criminal Procedure and that defendant's admissions made to the federal agents would have been inadmissible as evidence against him. *Mallory v. United States*, 354 U. S. 449 (1957); *Upshaw v. United States*, 335 U. S. 410 (1948); *McNabb v. United States*, 318 U. S. 332 (1943), *rehearing denied*, 319 U. S. 784 (1943). However, the question before us that we must decide is whether the admissions made here, inasmuch as they were obtained by federal officers while the defendant was in the hands of local police, are also inadmissible.

The leading case on this point is *Anderson v. United States*, 318 U. S. 350 (1943). There, following a dynamit-

ing of steel towers and TVA power lines, the defendants were arrested by the county sheriff and imprisoned without arraignment in violation of the state law. During their periods of illegal detention, which ranged from two to six days, six of the defendants were questioned intermittently by federal officers and finally confessed to the dynamiting. After they had confessed they were arrested by the federal officers and then arraigned before a United States Commissioner. Relying upon *McNabb v. United*

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States, supra, decided the same day, the Supreme Court held that the confessions so obtained were inadmissible at the trials. With respect to the fact that the illegal detentions were by local police, it said:

> "There was a working arrangement between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers." 318 U. S. at 356.

The Government, on the present appeal, asks us to construe this ambiguous language—*i.e.*, "a working arrangement"—so as to require, in order to prohibit the use in federal courts of confessions obtained by federal officers during an illegal detention by the local police, that the illegal detention be at the instance or at the request of federal officers. Clearly such an interpretation of the phrase "working arrangement" would result in an affirmance of the decision below, for the facts surrounding defendant's arrest do not, in our opinion, require the inference that the *Buffalo police acted upon the request of the FBI*, express-

ed or implied. Both the FBI agents and the Buffalo police denied that any such request was made.

However, we cannot accept the Government's construction. We must follow Supreme Court decisions as we read them, and not attempt redefinition of them. A careful reading of *Anderson* convinces us that the position urged upon us by the Government is a misinterpretation of that decision. The Court was careful to point out there that the *Anderson* arrests were made by the county sheriff "*on his own initiative,*" and that the prisoners were held in the custody of "*the state officers*" *while they were being ques-*

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tioned by the FBI. There is no indication whatever by the Court that the sheriff and his aides were not detaining the prisoners in order to perform their own primary function, that of the investigation of a local crime. The only "working arrangement" spelled out by the facts of that case is the one we have here—such cooperation between federal and local police as permitted the former to interrogate the latter's prisoners during their detention by the latter. It is without significance that the detentions and questioning periods in *Anderson* lasted much longer than here. The Supreme Court has made it clear that *McNabb v. United States* was decided without regard to coercion, psychological or physical, *Upshaw v. United States,* 335 U. S. 410 (1948), and *Anderson* was based on the principles which governed *McNabb.*[1]

The Fifth Circuit has placed a different interpretation upon *Anderson* than we do here, and the Supreme Court

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[1] In *McNabb* the Supreme Court had before it a violation of the congressional requirement that federal prisoners be promptly arraigned after having been apprehended. The Court stated that the purpose of this congressional require-

has declined to review its decisions. *Horne v. United States*, 246 F. 2d 83 (5 Cir. 1957), *cert. denied*, 355 U. S. 878 (1957); *Brown v. United States*, 228 F. 2d 286 (5 Cir. 1955), *cert. denied*, 351 U. S. 986 (1956), *rehearing denied*, 352 U. S. 861 (1956); *White v. United States*, 200 F. 2d 509 (5 Cir. 1952), *cert. denied*, 345 U. S. 999 (1953), *rehearing denied*, 346 U.S. 843 (1953); see *Papworth v. United States*, 256 F. 2d 125 (5 Cir. 1958), *cert. denied*, 358 U. S. 854 (1958), *rehearing denied*, 358 U. S. 914 (1958). However, a denial of a writ of certiorari imports no expression of opinion upon the merits of the decision wherein it is sought. *Elgin, Joliet, and Eastern Ry. Co. v. Gibson*, 355 U. S. 897 (1957); *Brown v. Allen*, 344 U. S. 443 (1953); *rehearing denied*, 345 U. S. 946 (1953); *House v. Mayo*, 324 U. S. 42 (1945), *rehearing denied*, 324 U. S. 886 (1945); *Atlantic Coast Line R. Co. v. Powe*, 283 U. S. 401 (1931); *United States v. Carver*, 260 U. S. 482 (1923); *Graeber v. Rhay*, 256 F. 2d 556 (9 Cir. 1958), *cert. denied*, 358 U. S. 857 (1958). Consequently, we are quite free to disagree with the position taken by that Circuit; and, in the light of the factual setting of *Anderson* we are of the opinion that we are obligated to do so.

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ment was to prevent any possibility that federal officers would engage in the abuses that sometimes accompany "secret interrogations," and the Court then decided that this prevention of abuses was so basic to a true administration of federal justice that federal courts would be derelict in the "duty of courts as agencies of justice and custodians of liberty" if they allowed themselves to countenance introduction into evidence of admissions obtained by federal officers from "secret interrogation of persons accused of crime."

No violation of this *congressional* requirement was involved in *Anderson*. There the illegal detention was solely that of Tennessee officers. However, the Court saw that the basic problem that was present in *McNabb* was equally present in *Anderson*. As in *McNabb* the *Anderson* defendants were interrogated by federal officers while they were being illegally detained without arraignment. To be sure, the failure to promptly arraign was the act of the Tennessee officers who were thereby violating their own Tennessee law, but the interrogation in both cases was by federal officers. The Supreme Court held that it was just as much the duty of a federal court to exclude admissions obtained by federal officers during the *Anderson* "secret interrogation" as it was to exclude admissions obtained by federal officers when the delay in the arraignment, as in *McNabb*, was the act of federal officers.

Just as the "working arrangement" spelled out in *Anderson v. United States* is, in our opinion, present here, the other factor relied upon in that case to invalidate the confessions, an illegal detention under the applicable state law, 318 U. S. 350, 355-56, is present here also. An examination of the New York law convinces us that the detention of defendant without arraignment from approximately 9:30 A. M. in the morning until he confessed late that evening, without any apparent reason (except for the purpose readily inferred), was illegal. *People v. Lovello*, 1 N. Y. 2d 436 (1956); *People v. Snyder*, 297 N. Y. 81 (1947); *People v. Alex*, 265 N. Y. 192 (1934); *People v. Mummiami*, 258 N. Y. 394 (1932); *People v. Trinchillo*, 2 A. D. 2d 146, 153 N. Y. S. 2d 685 (4th Dept. 1956); *People v. Redmond*, 265 App. Div.

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307, 38 N. Y. S. 2d 727 (3d Dept. 1942); *People v. Kelly*, 264 App. Div. 14, 35 N. Y. S. 2d 55 (3d Dept. 1942); *People v. Calebressi*, 233 App. Div. 79, 251 N. Y. S. 603 (3d Dept. 1931). The Government does not argue to the contrary.

The admissions were improperly admitted into evidence, and the defendant is entitled to a new trial.

Reversed and remanded.

MOORE, *Circuit Judge:*

I dissent in a separate opinion to be filed later.

Filed: December 4, 1959

MOORE, Circuit Judge (dissenting):

I dissent.

The decision of the majority, in my opinion, carries th holding of the Supreme Court in *Anderson v. United States*, 318 U. S. 350 (1943), into the controversial state-federal law enforcement territory far beyond the actual limits of that holding. Not only does the result reached conflict with recent decisions in the Fourth, Fifth and Sixth Circuits but it may well have detrimental effects on federal law enforcement. In an effort to assure the individual defendant of his constitutional rights (to guard which the courts must ever be zealous) the courts should not disregard the welfare of the millions of law-abiding citizens who are entitled to federal, state, county and city police protection against crime. This balancing of seemingly opposing interests has been commented upon so many times that its mere mention is trite. But it is not trite to create by judicial decision a needless impasse to obtaining necessary police protection.

Consider for a moment the virtually undisputed facts. Defendant Coppola, suspected upon sufficient grounds by the local Buffalo police of being about to commit a crime (*i.e.* robbery) with others, also suspected, was apprehended by the Buffalo police, for questioning by them, New York State police and by a representative of the Erie County District Attorney. The FBI, having been informed of the arrest and desirous of inquiring concerning various crimes under investigation, were permitted to interrogate defendant at Police Headquarters briefly during the afternoon and more extensively during the late evening of January

10, 1957. At this second interview statements, oral and written, were made to the FBI which, upon the trial from

which this appeal is taken, defendant's counsel sought to exclude. A protracted hearing (the jury not being present) was held by the trial judge, who, upon facts little disputed, concluded that the statements were admissible.

The majority admit that "the facts surrounding defendant's arrest do not, in our opinion, require the inference that the Buffalo police acted upon the request of the FBI, expressed or implied." Indeed, "inference" is not required because defendant's counsel expressly conceded "I do not claim that the Buffalo police made an arrest at the behest of the FBI." This concession was again repeated when the question arose as to whether any evidence was necessary to establish this fact. This fact being undisputed, no further evidence was received relating to that issue. There is no evidence that defendant was in any way mistreated or abused. After hearing all of the evidence and observing the witnesses the trial court came to the conclusion that the defendant's admissions to the FBI were admissible. The majority, however, without knowing why the local police held the defendant for investigation without arraignment from the time of his arrest on January 10 to the time he was taken before a local Commissioner on January 11, have not only held that the local police delayed too long in their arraignment proceeding but that any statement taken by the FBI during this State delay rendered defendant's admissions inadmissible in the federal court trial. This conclusion was reached despite the fact that the federal arraignment was made less than two hours after defendant was released from local police detention.

Completely misconstruing, in my opinion, the facts in the *Anderson* case, the majority claim to be bound by a principle which the opinion therein discloses was never declared. The decision in the *Anderson* case was based

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specifically upon a finding upon the particular facts of that case that there was a "working arrangement" between the federal officers and the local sheriff whereby the defendants were arrested and detained by the local police. The majority refer to these words as ambiguous language, overlooking the fact that if the language were ambiguous it should not have a binding effect on this case based on different facts. But the language was not ambiguous. The situation there was analogous to that found in agency cases where the act of the agent is imputed to the principal. In *Anderson* the facts show that the local police were in effect working for and on behalf of the federal authorities. Naturally a detention for such a purpose could well be considered a detention by federal authorities. It was a "working arrangement" for the benefit of the federal government.

In sharp contrast here the arrest was concededly an independent act of the Buffalo police without any request or suggestion by the FBI. On January 7, 1957 the Buffalo Agent-in-Charge of the FBI informed the Chief of Detectives of the Buffalo police that they had received information that a butcher, first name Paul, last name unknown, had been robbed in the night of January 4 by Coppola, D'Antuono and Simmons. The Agent asked if there were such a hold-up on the local police books. The hold-up was confirmed, the butcher being Paul Redlinski. On the basis of photographs made available to the Buffalo police by the FBI, Redlinski identified Coppola as the man who had robbed him on January 4.

On January 9 the FBI advised the police that the same three individuals had planned a further robbery in East Buffalo at 10:00 A. M. on the next day, January 10, possibly the El Chico Tavern on Clinton Street. The FBI Agent told the Buffalo District Attorney that "we felt obligated to furnish him with this information so that

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he might take whatever action he desired to protect the citizens of Buffalo and to prevent, if possible, another hold-up" (113aa). This, as well as the Redlinski robbery, was only a State offense and thus outside the jurisdiction of the FBI.

Thereupon the Buffalo police without any direction, suggestion, supervision or participation by the FBI made their own plans to safeguard the citizens of Buffalo against a contemplated crime which was wholly within their jurisdiction. Buffalo police were stationed in five different taverns where the suspected hold-up might be and the Detective Chief and two other Buffalo policemen were in an automobile at about 9:30 A. M. or 9:45 A. M. in the vicinity of Clinton and Babcock Streets. No FBI agent accompanied them. Seeing the three persons who were suspected of being about to commit a hold-up in a car in the vicinity of the tavern to be robbed the Buffalo police intercepted it and took the occupants to the Buffalo Police Station.

Reviewing the conduct of both Buffalo police and the FBI at this stage, there is no proof that the FBI for their own purposes or otherwise had any part in the decision or the actions of the Buffalo police in their endeavor to prevent a robbery. The arrest of Coppola and his companions was no part of any FBI scheme to obtain their detention for purposes of FBI investigation. The FBI had

learned of Coppola's alleged participation in the butcher robbery and had also learned of the robbery to be perpetrated the next morning. Surely no one would advocate their remaining silent and not informing the local police. The trial judge commented on the same subject saying: "here is information given—it seems to me entirely properly—it seems to me it would be a failure on the part of the FBI if they didn't make it known to the local authorities that a crime, according to their information, was about

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to be committed. There is no evidence that they gave these local police any instructions; the local police do as they please. They arrested him, what seems to me, regularly. Here was a man that wasn't being held just for investigation for one simple matter; it was quite apparent the Buffalo police wished to interview him with regard to many matters, and investigation went on" (129aa).

That subsequent notice of arrest of Coppola and his confederates was given to the FBI was normal police procedure. In fact it would have been most unnatural had the Buffalo police not done so. Interchange of information between the FBI and local police throughout the country should be encouraged if the public is to have proper safeguards against the commission of crime. This interchange, however, does not create the type of "working arrangement" found to exist in the *Anderson* case. Once the FBI knew of the whereabouts of the persons arrested it was their duty to endeavor to ascertain all possible facts from them concerning crimes which they were investigating. Since the only place this investigation could go forward was in the place where the suspects were to be found, namely, in the local police station, it was necessary to talk to them there. This the FBI did. They had no overriding

federal sovereign power to wrest the defendant from the custody of local police and take him to federal headquarters or to arraign him before a federal commissioner. The courtesies extended to the defendant by the FBI during the interviews and his almost immediate arraignment upon his release by the local police are undisputed. They attest the high degree of constitutional protection accorded by the FBI.

The opinion of the majority seems quite self-contradictory. They say that the purpose of the *Anderson* and *McNabb* cases is "to discourage illegal detentions by overzealous federal police officers" and while they point to no

fact showing any illegal detention by the federal police, from this hypothesis, they continue to say "that the same exclusionary rule [should] be applied when federal officers obtain the cooperation of local police, and through such cooperation the local police do the illegal detaining for the federal agents * * *" Again their statement is based upon a contrary-to-fact assumption because both defendant's counsel's admissions and the other proof show conclusively that the arrest and detention were not done at the behest of the federal agents. It would be hard to believe that the phrase "working arrangement" used by Mr. Justice Frankfurter in the *Anderson* case based upon the facts presented there could possibly have been used were the facts of this case before that court. Yet the majority are squarely holding that the mere permission by local police given to the FBI to interview, in the local police station, a person arrested by the local police upon information furnished by the FBI for a purely State offense is such a "working arrangement" as will preclude the introduction of any admissions thereby obtained in evidence

in the federal court. *Anderson* does not call for this conclusion and, in my opinion, the decision here is a most unwise extension of an already well extended principle.

A careful consideration of the *Anderson*, *McNabb* and *Mallory* cases by the Fourth, Fifth and Sixth Circuits has led them to conclusions diametrically opposed to the conclusion of the majority here. In *Carpenter v. United States*, 4 Cir., 1959, 264 F. 2d 565, 571, the court said:

> "Federal rules and statutes governing the arraignment of persons in federal custody have no application, however, to the arraignment by state officials of state prisoners, unless, of course, the state officials are acting for, and under the direction of, federal agents
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> under circumstances which fairly warrant the conclusion that the custody is federal in substance.
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> "The arresting officer was executing no federal warrant. * * * The officer was neither under the control nor the direction of the FBI, and his custody was that of the state, which could not be converted into federal custody merely by reason of the prior receipt of the widely broadcast FBI flyer" (p. 572).

In *Stephenson v. United States*, 6 Cir., 1958, 257 F. 2d 175, the defendant was in the custody of the state. He was not arrested under a federal warrant until some thirteen days later and was immediately taken before a United States Commissioner. The court held that the rulings in *McNabb*, *Anderson* and *Mallory* were not applicable.

In *Papworth v. United States*, 5 Cir., 1958, 256 F. 2d 125, the court conceded that the local police officers had committed acts "which, had the entire matter been within

exclusive federal control, would have tainted any admissions made to the officers with invalidity" (p. 128). However, there the Court of Appeals found that "there is adequate support for the trial court's finding that the arrest was by the state officers without inducement by the FBI agents, and that therefore the detention was state and not federal detention. There was thus no requirement, since there was no opportunity, for the federal agents to take Papworth before the United States Commissioner until the state officers made him available for that purpose. There is no complaint that once actual custody was turned over to the federal agents there was any delay in the arraignment" (p. 128).

To the same effect in the Fifth Circuit are *White v. United States*, 5 Cir., 1952, 200 F. 2d 509, cert. den. 345 U. S. 999, and *Brown and Hogue v. United States*, 5 Cir., 1766g 1955, 228 F. 2d 286. Here there is a concession that the arrest was by state officers without inducement by FBI agents, so that an *a fortiori* situation is presented in support of sustaining the trial court in its answer to the preliminary question of admissibility.

Quite apart from the cases the consequences of the majority decision should be considered. Assume a person at large is wanted by the FBI for serious crimes, such as, bank robbery or murder of government agents. The FBI learns that the suspect has been picked up for a misdemeanor by the local police and is in some local jail. Proper police investigation calls for them to interview the suspect at the earliest possible moment. They seek such an interview and eventually it is granted and valuable statements are made by the suspect. The FBI depart and obtain a warrant. At that point the prisoner is

still solely within the custody of the local authorities. For reasons of their own they choose not to arraign him before a local magistrate for one or two days and only then release him to federal authorities. Another variation of the same hypothesis would be the situation where a prisoner had been detained for some time before any notice of his apprehension was given by local police to the FBI. If the rule laid down by the majority here is to be the law, local or state police officers, by action which the federal authorities would be powerless to prevent, could completely frustrate the prosecution of confessed crimes of first degree magnitude. Such a result would certainly not aid the purpose of the *McNabb* rule, namely, deterrence of illegal detention by federal police officers.

In my opinion the conclusion of the trial judge was reached after carefully searching the facts relative to the oral and written statements made by the defendant and his conclusion that they were admissible as well as the conviction should be affirmed.

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Filed: December 4, 1959.

MOORE, *Circuit Judge* (dissenting opinion):

See dissenting opinion in *United States of America v. Frank R. Coppola*, Docket No. 25177, filed December 4, 1959.

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Argued March 9, 1959
Original Opinion Filed July 20, 1959.)

(Reargued before the Court *en banc*, December 15, 1959
Decided May 20, 1960.)

Docket No. 25177

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK R. COPPOLA,
Defendant-Appellant,

Before:

LUMBARD, *Chief Judge,*

CLARK, WATERMAN, MOORE and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Western District of New York, Stephen W. Brennan, *J.*, after a jury trial in which the defendant was convicted of violating 18 U. S. C. A. Section 2113(a) and (b). Defendant alleges that it was error to receive in evidence admissions made by him to the F. B. I. while he was held in the custody of local police.

Affirmed.

JAMES W. KNAPP, Staff Assistant, Department of Justice, Washington, D. C. (John O. Henderson, United States Attorney, Western District of New York, Buffalo, N. Y., Leo J. Fallon, Special Assistant United States Attorney, Western District of New York, Buffalo, N. Y., on the brief), *for plaintiff-appellee.*

WILLIAM B. MAHONEY, Buffalo, N. Y., *for defendant-appellant.*

MOORE, *Circuit Judge:*

Subseqeunt to the argument and decision of this case by the original panel, the United States petitioned for a rehearing *en banc* as to the defendant, Frank R. Coppola, 28 U. S. C. A. § 46(c). Because of the importance of the question involved, the petition was granted and a second argument was heard by all the active judges of the court.

The defendant, Frank R. Coppola, was convicted, after a trial by jury in the Western District of New York, on all three counts of an indictment charging violations of 18 U. S. C. A. § 2113(a) and (b). The first count alleged that defendant on or about February 15, 1956 by force, violence and intimidation, took approximately $52,529 from a branch of the Manufacturers and Traders Trust Co. in Buffalo, New York, said company being a member of the Federal Reserve System; the second count charged defendant with entering that bank with intent to commit larceny; and the third count charged him with taking and carrying away from that bank, with intent to steal, the sum of approximately $52,529.

Coppola's sole contention on this appeal is that admissions made by him, oral and written, were improperly re-

ceived in evidence against him. He claims that these admissions were made during an illegal detention[1] by the Buffalo police acting under a "working agreement" with the F. B. I. and that the admissions should therefore have been excluded under *Anderson v. United States*, 318 U. S. 350 (1943). We do not agree. We conclude upon an analysis of the facts that the trial judge properly found that the F. B. I. in no way caused or contributed to Coppola's detention by the Buffalo police. Consequently, the doctrine of the *Anderson* case is inapplicable and the judgment is affirmed.

To resolve the issues here presented a thorough review of the circumstances under which the admissions were given must be made. On January 4, 1957 the butcher shop of Paul Redlinski, in Buffalo, New York was robbed. The robbery was under investigation by the Buffalo police. On January 7, 1957 the Agent-in-Charge of the F. B. I. in Buffalo, John A. Roche, relayed to John M. Golombeck, Chief of Detectives of the Buffalo police, information that the defendant Coppola and two others, D'Antuono and Simmons, had committed the robbery. Roche furnished Golombeck with photographs of these three individuals. Redlinski identified Coppola. On January 9, 1957 Roche again communicated with Golombeck and informed him that the F. B. I. had information that the same three individuals were contemplating a holdup at 10:00 A.M. the next morning, January 10—probably of the El Chico Tavern on

[1] The government concedes that the delay of several hours by the local police in arraigning Coppola constituted an unlawful detention under New York law. See *People v. Lovello*, 1 N. Y. 2d 436 (1956). In our view, however, whether a detention is illegal under state law has no bearing upon the propriety of receiving admissions in evidence in a federal criminal proceeding.

Had the arrest and subsequent delay in arraignment been occasioned by federal officers, it is most probable that Coppola's detention would have been in violation of Rule 5(a) of the Federal Rules of Criminal Procedure. See *McNabb v. United States*, 318 U. S. 332 (1943).

Clinton Street, in East Buffalo. Roche also gave the same information to John Dwyer, District Attorney of Erie County "so that he might take whatever action he desired to protect the citizens of Buffalo and prevent, if possible, another holdup." He also told Dwyer that the F. B. I. had been investigating Coppola in connection with the holdup by two masked men of the Clinton-Bailey branch of the Manufacturers and Traders Trust Company on February 15, 1956, and the robbery of the Linwood Branch of the Liberty Bank of Buffalo on October 2, 1956.

Having received this information, the Buffalo police stationed details from their own force in five different taverns where they suspected the holdup might take place. On the morning of January 10, Golombeck and two other members of the Buffalo police force were in a car in the vicinity of the El Chico Tavern. Observing a car in which Coppola, D'Antuono and Simmons were the occupants, the police officers intercepted them and took them to Buffalo police headquarters. Sometime thereafter, but before noon, Golombeck advised Roche of their apprehension. Roche, Golombeck, Dwyer and Klink (a member of the Buffalo Police Department) had lunch and thereafter, with Dwyer, Roche visited Coppola in police headquarters. Dwyer told Coppola that he was interested in him in connection with a series of crimes and specifically questioned him about the Redlinski robbery. Roche questioned Coppola briefly about the M. & T. robbery, but left to secure a form permitting a search to be made of Coppola's home. Although he had originally stated that he had no objection to a search, when Roche returned with the form, Coppola declined to sign it and no search was made. The afternoon and early evening at police headquarters was taken up largely by various appearances of the three individuals in the "show-up" room and with interrogation by the Buffalo police concerning the

Redlinski robbery, a robbery on East Eagle Street, Buffalo, and a crime in Niagara Falls, all state offenses.

Later that evening, at about 9:00 P.M., after a second "show-up" at police headquarters, agents of the F. B. I. talked to the prisoners about the bank robberies. During the course of these interrogations (commencing at about 9:40 P.M.), the admissions which were received in evidence were made by Coppola. The next day, January 11, before noon, the F. B. I. requested that Coppola be delivered to them so that he could be arraigned on the federal charges. He was not delivered immediately but first arraigned by the Buffalo police, at about 2:00 P.M., before a local magistrate in the City Court of Buffalo. Thereafter he was turned over to the F. B. I. and promptly arraigned before a United States Commissioner.

At the trial Coppola urged that his admissions should be suppressed. A hearing was held by the trial court without the presence of the jury at which members of the Buffalo police force and the F. B. I. testified. The court concluded that the statements were not obtained by means of coercion or unlawful collaboration between local and federal officials and denied the motion to exclude the evidence.

In *Anderson v. United States, supra,* the Supreme Court held that admissions made to F. B. I. agents during a detention by state officers, who were acting at the behest and upon the instructions of the federal officials, were inadmissible because the detention was under circumstances unlawful under the rule of *McNabb v. United States, supra,* later codified by Rule 5(a) of the Federal Rules of Criminal Procedure. In that case property owned by the Tennessee Valley Authority, a corporation in which the United States is a stockholder, had been damaged by dynamiting—a violation of the Federal Criminal Code. F. B. I. agents were called in to investigate. Various suspects were taken into custody by the local sheriff and detained in a building. The

questioning, however, with relation to the federal crime was carried on by federal officers over a period of days. No state criminal charges were preferred during the period of detention or at any time thereafter against the defendants. There is no indication that the state officers participated in the interrogation or were endeavoring to solve any state crime. Upon the facts it was quite apparent that the state detention was solely to enable federal officers to pursue their investigation and that the federal agents were responsible for the long delay in arraignment. Hence, the Supreme Court concluded that there existed a "working arrangement" between the federal officers and the local sheriff and that the sheriff was in effect acting as an agent for the F. B. I.

Coppola urges that the facts surrounding his detention fall within the scope of the *Anderson* decision. We do not agree. The differences in the facts are significant. Here Coppola and his two companions were arrested by the Buffalo police on their own initiative because of information that they had committed and were about to commit a crime or crimes in violation of state law. The arrangements to intercept and detain the three men on the morning of January 10 were exclusively planned and executed by the Buffalo police without any suggestion or participation by the F. B. I. In fact Coppola's counsel specifically stated that "I do not claim that the Buffalo police made an arrest at the behest of the F. B. I." The arrest and detention were not to aid or abet the F. B. I. in their investigation or for the purpose of enabling them to interrogate the persons apprehended about federal matters while in state custody. The apprehension and the detention were for questioning about the Redlinski robbery and other local robberies exclusively within the jurisdiction of the Buffalo police. At police headquarters after the arrest, the Buffalo police questioned Coppola and his companions con-

cerning the state offenses. The record shows that the state concentrated on its own business first. These investigations and the necessary appearances in the local "show-ups" occupied most of the day. Coppola could not have been arraigned after 5:00 P. M. on January 10, 1957 in the Buffalo City Court.* The next time he could have been arraigned was the following morning so that F. B. I. interrogation that evening did not contribute to any delay in arraignment. When questioned by the F. B. I. agents, Coppola was fully advised that he did not have to make a statement, that any statement could be used against him, and that he was entitled to advice of counsel. However, he indicated a willingness to talk and dictated a statement which was taken down in handwritten form, read over by him and then signed. Coppola had had grammar school and junior high school education as well as an accounting course for approximately a year at a business college. He was able to read and understand that which he signed. There is no evidence of any coercion, mistreatment or abuse. There is no claim made that there was any delay in arraignment by the F. B. I. or that any admissions were made during the period between his release by the local authorities and his arraignment before a United States Commissioner.

The cases other than *Anderson v. United States, supra*, cited by Coppola's counsel involved fact situations wholly different from that of the case before us. In *Byars v. United States*, 273 U. S. 28 (1926), a federal officer accompanied state officers on an illegal search and seizure. There upon the facts the court held that the illegal search "was a joint operation of the local and federal officers" and that "the effect is the same as though [the federal officer] had en-

* Both counsel agreed to this fact upon the oral argument on December 15, 1959.

gaged in the undertaking as one exclusively his own." *Id.* at 33.

In *Gambino v. United States*, 274 U. S. 310 (1927), state officers conducted an illegal search and seizure looking for intoxicating liquor in the days of the National Prohibition Act. The court held that the action of the state troopers in endeavoring to enforce the Act was such that it could be said that the illegal search was "solely for the purpose of aiding in the federal prosecution." *Id.* at 315.

McNabb v. United States, supra, involving as it does an arrest and detention solely by federal officers without participation by local officials, is also not controlling upon us in this case.

In complete contrast with the cases upon which appellant relies, there is in this record no basis for the conclusion that the apprehension and continued detention of Coppola and his two companions was at the behest of federal officers or for the purpose of aiding any investigation they wished to conduct. That the Buffalo police notified the F. B. I. of the defendants' apprehension would be normal police procedure. Only by such an interchange of information can society be adequately protected against crime. The custody of the defendants after arrest was exclusively that of the Buffalo police, as was their interrogation. However, once the F. B. I. knew of the defendants' arrest, it was their duty to endeavor to ascertain all the available facts about the federal crimes which they were investigating. To do this the F. B. I. agents were obliged to conduct their interrogation in the local police station and of course to obtain consent of the local police. That the apprehension and detention were exclusively for state crimes is reflected by the fact that, except for the brief conversation in the afternoon when permission was sought to search Coppola's home, not until well along in the evening was any opportunity given to the

F. B. I. to question the defendants concerning the matters in which the federal officers were interested.

Appellant argues that from February 15, 1956, the date of the M. & T. bank robbery, until defendants' arrest on January 10, 1957, the Buffalo police and the F. B. I. collaborated in trying to solve the crime, and from this fact would draw the conclusion that there must have been a "working arrangement" between them. Mere words however, such as exchange of information, cooperation, collaboration, or even "working arrangement" do not carry within themselves any solution to the difficult problems of federal-state relations here involved. If this cooperation reached the point of arrest and detention by local police for the purpose of enabling federal officers to question the defendants concerning the bank robberies for a period of time forbidden to federal officers by Rule 5(a) of the Federal Rules of Criminal Procedure, admissions thus obtained would properly be excluded. Such a rule prevents federal officers from evading the letter and the spirit of Rule 5(a). The rule excludes confessions when the "working arrangement" includes the illegal detention—in other words, when federal law enforcement officers induce state officers to hold the defendant illegally so that they may secure a confession. However, to bring a case within this rule there must be facts, as there were in *Anderson*, not mere suspicion or conjecture. Here, as in *Abel v. United States*, 258 F. 2d 485, 494 (2d Cir. 1958), *aff'd*, 362 U. S. 217, 226-230 (1960), rehearing denied, May 16, 1960, there is no basis on which this court can properly reverse the conclusion of the district judge. The Supreme Court's decision in that case makes plain that the mere fact that two or more agencies have the same crime or the same suspects on their books and that they are cooperating to achieve a solution does not make one the agent of the other and thus responsible for the other's acts.

If there is to be effective law enforcement, it is to be expected that every police agency, be it state, county, city or federal, will cooperate and exchange information. Probably the F. B. I. and local police have in countless cases the same crimes and the same suspects on their books. Undoubtedly after the Liberty Bank robbery in the present case, both state and federal agencies had the crime under investigation. However, there is no evidence that the F. B. I. had any knowledge whatsoever of the action the Buffalo police might take as a matter of local law enforcement. Nor is there any reason why the local officials should have discussed their proposed action with the F. B. I. In the absence of any evidence of collaboration to achieve an unlawful end, we would not be warranted in creating a rule whereby prior cooperation of state and federal officials in the investigation of crime would prohibit the admission of uncoerced confessions made during a detention by state officers which the Federal officials did not induce and were powerless to prevent.[2]

CLARK, *Circuit Judge:*

I dissent. I concur in Judge Waterman's dissenting opinion.

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[2] Recent decisions of other circuits in cases involving facts similar to those here have rejected attacks upon the admissibility of evidence obtained by federal agents during a state detention on the ground that the relationship between the local and federal authorities was not comparable to the "working arrangement" described in *Anderson v. United States, supra.* See *White v. United States,* 5 Cir., 1952, 200 F. 2d 509; also *Carpenter v. United States,* 264 F. 2d 565 (4th Cir.), cert. denied, 360 U. S. 936 (1959); *Stephenson v. United States,* 257 F. 2d 175 (6th Cir. 1958); *Papworth v. United States,* 256 F. 2d 125 (5th Cir. 1958), cert. denied, 358 U. S. 854.

WATERMAN, *Circuit Judge* (dissenting):

I dissent.

There are two separate appeals before the court sitting *in banc*. The first appeal is from Coppola's conviction upon the indictment arising out of the robbery of the Manufacturers and Traders Trust Company on February 15, 1956. The second is from his conviction on three counts of aiding, abetting, and counseling four defendants who robbed the Liberty Bank of Buffalo, Linwood Branch, on October 2, 1956. The indictments in both cases were filed on February 4, 1957. The Manufacturers and Traders Trust Company case in which Coppola was charged with physically participating in the actual robbery was tried in July 1957, before Judge Brennan of the northern District of New York, sitting in the Western District by designation, and a jury. Coppola was sentenced to 20 years. The second case in which Coppola was charged with having aided, abetted and counseled those who entered the bank though he did not actually participate physically in the holdup was tried in November 1957 before Judge Morgan and a jury. Coppola was sentenced to another 20 years to be served consecutively to the 20 years imposed upon him by Judge Brennan. Coppola did not testify before the jury in either case.

The indictments were filed after Coppola had been apprehended by Buffalo police officers in the forenoon of January 10, 1957 and after he had been interrogated that evening and in the early hours of January 11, 1957 by agents of the Federal Bureau of Investigation. Incriminating admissions concerning his implication in the two bank robberies were made by Coppola to the agents at that time. The Government at trial sought to introduce these admissions into evidence, and the attorney for Coppola requested and received a hearing outside the presence

of the jury for the purpose of having these admissions suppressed. Judge Brennan in the first case, and Judge Morgan in the second, refused to suppress, and each judge ruled that the statements were admissible in evidence. From these rulings defendant appealed.

The appeals were heard at the same time by a panel of this court composed of Judge Washington of the Court of Appeals for the District of Columbia Circuit, sitting with us by designation at our request, and Judges Waterman and Moore. Argument was had on March 9, 1959, and the majority opinion of a divided court was filed July 20, 1959. The Government petitioned for a rehearing *in banc* which was granted.

The Government maintained in its rehearing petition that the panel majority had misapplied the rule expressed by the Supreme Court in *Anderson v. United States*, 318 U. S. 350 (1943) to the facts of the apprehension, detention, and interrogation of Coppola; and that a proper application of the rule to the facts would have required affirmances instead of reversals of the trial rulings. The *in banc* majority finds that the Government's contention has merit. I disagree. The *in banc* majority's efforts to sustain the different result they reach here from the result the Supreme Court reached in *Anderson* by attempting meaningfully to distinguish the facts in the two cases appears to me to have been a failure.

The passage of time, the reargument before the *in banc* court, and the *in banc* majority opinion have only served to reinforce my belief in the validity of my July 20, 1959 opinion, the opinion in which Judge Washington joined. Therefore, I insert as part of this dissent that entire opinion, and, after quoting it, I will comment upon the content of the majority opinion from which I am now dissenting.

The Opinion of the Panel Majority in Docket No. 25177[1]

[Found at pp. 1760-1766 of Second Circuit printed opinions October Term, 1958]

No. 43—October Term, 1958.

(Argued March 9, 1959 Decided July 20, 1959.)

Docket No. 25177

The United States of America, —
Plaintiff-Appellee,

v.

Frank R. Coppola,
Defendant-Appellant,

and

Dario D'Antuono, a/k/a "Danny" D'Antuono,
Defendant.

Before:

Washington, Waterman, and Moore,
Circuit Judges.

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[1] The majority opinion of the panel in the second case, No. 25257, relating to the Liberty Bank holdup, insofar as it related to Copolla's appeal, referred to the opinion in Docket No. 25177, and its disposition was governed by the same considerations. All that I said there that has any bearing on the matters now before us is found at pages 1768-1769 of the October Term, 1958 slip sheet reports of our court, and reads as follows:

"Defendant Coppola

"During the course of the trial a member of the FBI, Gordon Eddy, was produced as a witness by the Government. He sought to give testimony relative to an oral confession made to him by Coppola. The latter moved to have this evidence suppressed, but after a hearing conducted out of the presence of the jury the dis-

WATERMAN, *Circuit Judge:*

The defendant, Frank R. Coppola, was convicted, after a trial by jury in the Western District of New York on all three counts of an indictment charging violations of 18 U. S. C. §2113(a) and (b). The first count alleged that defendant by force, violence and intimidation, took approximately $52,529.00 from a Buffalo, New York branch of the Manufacturers and Traders Trust Co., said company being a member of the Federal Reserve System; the second count charged defendant with entering that bank with intent to commit larceny; and the third count charged him with taking and carrying away from that bank, with intent to steal, the sum of approximately $52,529.00. Defendant's sole contention on this appeal is that admissions by him, oral and written, were improperly allowed into evidence. As a result of those claimed errors, he seeks a new trial.

The facts necessary for a determination of this question follow. On February 15, 1956 the Clinton-Bailey Branch, in Buffalo, New York, of the Manufacturers and Traders Trust Co. was held up and robbed by two masked men. The defendant was a suspect as early as February 20, 1956, five days after the robbery, but no arrest was made. Subsequent to that time the FBI received the aid of a confidant of defendant. As a result of that aid the FBI came to believe that defendant was responsible for an unrelated

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trict court permitted the testimony. As was proper, however, it carefully instructed the jury that Eddy's testimony relative to Coppola's oral confession was not to be considered binding upon Simmons or upon Millio.

"The evidence produced at that hearing reveals that the oral admissions testified to by Agent Eddy were made at the same time and under the same circumstances as those described in United States v. Frank R. Coppola, ——— F. 2d ——— (2 Cir. 1959), decided this day. Therefore, for the reasons given in that decision, we hold that the testimony was improperly allowed against Coppola and that he is entitled to a new trial."

crime, a robbery of a local butcher; and John A. Roche, Special Agent in Charge of the FBI in Buffalo, communicated that belief to John Golombeck, the City of Buffalo Chief of Detectives, on January 7, 1957. By means of photographs of defendant supplied by the FBI to the city

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police the butcher identified defendant. On January 9, 1957 Roche again contacted Golombeck and informed him that defendant and two others were planning to rob a tavern in East Buffalo the following day. Roche then communicated the same information to the County District Attorney, and told him that defendant was also a suspect in a bank robbery. About 9:30 A. M. on January 10, 1957 Golombeck with two other Buffalo policemen arrested defendant and two of his companions. Golombeck then telephoned Roche that defendant had been arrested and was being taken to police headquarters. That afternoon when defendant was being interrogated by the County District Attorney, Roche was present. He questioned defendant briefly about his connection with the Manufacturers and Traders Trust Co. robbery. That evening two FBI agents, acting on orders from Roche, went to police headquarters, and there questioned defendant in his cell from 9:00 P. M. until about 12:45 A. M. on January 11. It was during this period that defendant made the incriminating statements involving him in the February 15, 1956 bank hold-up. These statements were then reduced to writing. Thereafter, at 11:00 A. M. on January 11, 1957, the FBI requested that defendant be turned over to them. However, the federal officers did not obtain custody of Coppola until about 4:00 P. M. on that day. In the meantime, after the FBI request, at about 2:00 P. M. that day defendant was arraigned in the City Court of Buffalo. This was the first time he had been brought before any magistrate after he had

been picked up at mid-morning of the previous day. After he was turned over to the FBI he was promptly arraigned before a United States Commissioner. Although Roche and the local police testified to a spirit of cooperation between their respective law enforcement departments, they denied that defendant was arrested by the police officers at the FBI's request. Defendant made a timely motion at the [1761] trial to suppress all evidence of his admissions. After a hearing out of the jury's presence the district court denied the motion to suppress. He held that, as a matter of law, there "was no unusual delay" of a nature that should foreclose the introduction of the evidence of the Government concerning the defendant's incriminating statements made to the federal agents while he was held by the Buffalo police.

If federal officers had picked up the defendant and had incarcerated him from approximately 9:30 A. M. on January 10, 1957 until after midnight that night and during that time had interrogated him to the extent of the interrogation here, there would seem to be little doubt that his detention would have been in violation of Rule 5(a) of the Federal Rules of Criminal Procedure and that defendant's admissions made to the federal agents would have been inadmissible as evidence against him. *Mallory v. United States*, 354 U. S. 449 (1957); *Upshaw v. United States*, 335 U. S. 410 (1948); *McNabb v. United States*, 318 U. S. 332 (1943), *rehearing denied*, 319 U. S. 784 (1943). However, the question before us that we must decide is whether the admissions made here, inasmuch as they were obtained by federal officers while the defendant was in the hands of local police, are also inadmissible.

The leading case on this point is *Anderson v. United States*, 318 U. S. 350 (1943). There, following a dynamit-

ing of steel towers and TVA power lines, the defendants were arrested by the county sheriff and imprisoned without arraignment in violation of the state law. During their periods of illegal detention, which ranged from two to six days, six of the defendants were questioned intermittently by federal officers and finally confessed to the dynamiting. After they had confessed they were arrested by the federal officers and then arraigned before a United States Commissioner. Relying upon *McNabb v. United*

[1762]

States, supra, decided the same day, the Supreme Court held that the confessions so obtained were inadmissible at the trials. With respect to the fact that the illegal detentions were by local police, it said:

> "There was a working arraignment between the federal officers and the sheriff of Polk County which made possible the abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with state officers." 318 U. S. at 356.

The Government, on the present appeal, asks us to construe this ambiguous language—i.e., " a working arrangement"—so as to require, in order to prohibit the use in federal courts of confessions obtained by federal officers during an illegal detention by the local police, that the illegal detention be at the instance or at the request of federal officers. Clearly such an interpretation of the phrase "working arrangement" would result in an affirmance of the decision below, for the facts surrounding defendant's arrest do not, in our opinion, require the inference that the Buffalo police acted upon the request of the FBI.

expressed or implied. Both the FBI agents and the Buffalo police denied that any such request was made.

However, we cannot accept the Government's construction. We must follow Supreme Court decisions as we read them, and not attempt redefinition of them. A careful reading of *Anderson* convinces us that the position urged upon us by the Government is a misinterpretation of that decision. The Court was careful to point out there that the *Anderson* arrests were made by the county sheriff "on his own initiative," and that the prisoners were held in the custody of "the state officers" while they were being ques-

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tioned by the FBI. There is no indication whatever by the Court that the sheriff and his aides were not detaining the prisoners in order to perform their own primary function, that of the investigation of a local crime. The only "working arrangement" spelled out by the facts of that case is the one we have here—such cooperation between federal and local police as permitted the former to interrogate the latter's prisoners during their detention by the latter. It is without significance that the detentions and questioning periods in *Anderson* lasted much longer than here. The Supreme Court has made it clear that *McNabb v. United States* was decided without regard to coercion, psychological or physical, *Upshaw v. United States*, 335 U. S. 410 (1948), and *Anderson* was based on the principles which governed *McNabb*.[1]

[1] In *McNabb* the Supreme Court had before it a violation of the congressional requirement that federal prisoners be promptly arraigned after having been apprehended. The Court stated that the purpose of this congressional requirement was to prevent any possibility that federal officers would engage in the abuses that sometimes accompany "secret interrogations," and the Court then decided that this prevention of abuses was so basic to a true administration of federal justice that federal courts would be derelict in the "duty of courts as agencies of justice and custodians of liberty" if they allowed themselves to counte-

The Fifth Circuit has placed a different interpretation upon *Anderson* than we do here, and the Supreme Court [1764] has declined to review its decisions. *Horne v. United States*, 246 F. 2d 83 (5 Cir. 1957), *cert. denied*, 355 U. S. 878 (1957); *Brown v. United States*, 228 F. 2d 286 (5 Cir. 1955), *cert. denied*, 351 U. S. 986 (1956), *rehearing denied*, 352 U. S. 861 (1956); *White v. United States*, 200 F. 2d 509 (5 Cir. 1952), *cert. denied*, 345 U. S. 999 (1953); *rehearing denied*, 346 U. S. 843 (1953); see *Papworth v. United States*, 256 F. 2d 125 (5 Cir. 1958), *cert. denied*, 358 U. S. 854 (1958) *rehearing denied*, 358 U. S. 914 (1958). However, a denial of a writ of certiorari imports no expression of opinion upon the merits of the decision wherein it is sought. *Elgin, Joliet, and Eastern Ry. Co. v. Gibson*, 355 U. S. 897 (1957); *Brown v. Allen*, 344 U. S. 443 (1953); *rehearing denied*, 345 U. S. 946 (1953); *House v. Mayo*, 324 U. S. 42 (1945), *rehearing denied*, 324 U. S. 886 (1945); *Atlantic Coast Line R. Co. v. Powe*, 283 U. S. 401 (1931); *United States v. Carver*, 260 U. S. 482 (1923); *Graeber v. Rhay*, 256 F. 2d 556 (9 Cir. 1958), *cert. denied*, 358 U. S. 857

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nance introduction into evidence of admissions obtained by federal officers from "secret interrogation of persons accused of crime."

No violation of this *congressional* requirement was involved in *Anderson*. There the illegal detention was solely that of Tennessee officers. However, the Court saw that the basic problem that was present in *McNabb* was equally present in *Anderson*. As in *McNabb* the *Anderson* defendants were interrogated by federal officers while they were being illegally detained without arraignment. To be sure, the failure to promptly arraign was the act of the Tennessee officers who were thereby violating their own Tennessee law, but the interrogation in both cases was by federal officers. The Supreme Court held that it was just as much the duty of a federal court to exclude admissions obtained by federal officers during the *Anderson* "secret interrogation" as it was to exclude admissions obtained by federal officers when they delay in the arraignment, as in *McNabb*, was the act of federal officers.

(1958). Consequently, we are quite free to disagree with the position taken by that Circuit; and, in the light of the factual setting of *Anderson*, we are of the opinion that we are obliged to do so.

Just as the "working arrangement" spelled out in *Anderson v. United States* is, in our opinion, present here, the other factor relied upon in that case to invalidate the confessions, an illegal detention under the applicable state law, 318 U. S. 350, 355-56, is present here also. An examination of the New York law convinces us that the detention of defendant without arraignment from approximately 9:30 A. M. in the morning until he confessed late that evening, without any apparent reason (except for the purpose readily inferred), was illegal. *People v. Lovello*, 1 N. Y. 2d 436 (1956); *People v. Snyder*, 297 N. Y. 81 (1947); *People v. Alex*, 265 N. Y. 192 (1934); *People v. Mummiami*, 258 N. Y. 394 (1932); *People v. Trinchillo*, 2 A. D. 2d 146, 153 N. Y. S. 2d 685 (4th Dept. 1956); *People v. Redmond*,

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265 App. Div. 307, 38 N. Y. S. 2d 727 (3d Dept. 1942); *People v. Kelly*, 264 App. Div. 14, 35 N. Y. S. 2d 55 (3d Dept. 1942); *People v. Calebressi*, 233 App. Div. 79, 251 N. Y. S. 603 (3d Dept. 1931). The Government does not argue to the contrary.

The admissions were improperly admitted into evidence, and the defendant is entitled to a new trial.

Reversed and remanded.

[1766]

Comments Upon Present Majority Opinion

I

I believe that the efforts in the present majority opinion to distinguish the factual situation presently before us from that in *Anderson v. United States*, 318 U. S. 350 (1943) have been unsuccessful. An examination of the statement of facts in the *Anderson* case, *supra*, at pp. 352-55, will reveal that there a state crime clearly was involved—the wilful destruction of power lines, see footnote 2 at p. 352. A state officer, the sheriff, acting "on his own initiative," took into his custody persons, including the eight *Anderson* petitioners, whom he personally suspected of participating in the dynamiting of the power lines. Moreover, to suggest (as the majority opinion appears to suggest) that the sheriff or any of his deputies, or any other state officer, subsequent to the state arrests, did not interrogate persons they themselves arrested is to indulge in a surmise entirely unwarranted by anything that appears in the Supreme Court's opinion.[2] Finally, at the time of the arrests, detentions, and interrogations in *Anderson* in April 1940 there was no reason, as federal agents may believe there is now, for the federal agents to enlist state connivance in effecting the apprehension and detention of suspects. *McNabb v. United States*, 318 U. S. 332 (1943), *rehearing denied*, 319 U. S. 784, had not been decided then, and the federal agents could well have believed that the confessions obtained from the *Anderson* defendants would have been admissible in a federal court as proof of federal crimes even if the apprehension and detention of the confessing prisoners had been

[2] Indeed, the opinion of the Court of Appeals in the *Anderson* case, 124 F. 2d 58, 67 (6 Cir. 1941) strongly suggests that the defendants *were* interrogated by the sheriff and his deputies subsequent to arrest.

exclusively that of federal officers. Thus I believe that the majority here has entirely misread the *Anderson* case when they conclude that upon its facts "it was quite apparent that the state detention was solely to enable federal officers to pursue their investigation * * *".

Even had the facts in *Anderson* been as the majority here wishes them to have been, the rule of law which the majority here announce is incompatible with the theory upon which *Anderson* was decided. My colleagues appear to hold that, under *Anderson*, a confession to federal officers, prior to any arraignment, made by a prisoner detained in state custody, need not be excluded from evidence in a federal court unless the state arrest was made at the request of federal officers or unless the federal officers participated in determining the length of time the prisoner was to be detained prior to any arraignment, state or federal.[8]

[8] The present *in banc* majority opinion appears to suggest that the rule set forth by the panel majority in the July 20, 1959 opinion hinged upon the fact that the state and federal officers had cooperated in the prior investigation of the crimes to which Coppola confessed while in state detention. A closer reading of the opinion of the panel majority will reveal that this is incorrect. We stated: "The only 'working arrangement' spelled out by the facts of that case [Anderson] is the one we have here—such cooperation between federal and local police as permitted the former to interrogate the latter's prisoners during their detention by the latter." (P. 1764.) The panel majority would have reached its result even if the federal-state cooperation in the earlier investigation of the crime had been absent. However, under the rule of law which I understand the *in banc* majority of this court here to announce, and assuming, *arguendo*, the validity of this rule of law, the fact of federal-state cooperation in the prior investigation of the crime has evidentiary significance and militates against the conclusion which the majority reach. If federal and state authorities have worked closely together in the investigation of a case there surely is likelihood that this cooperation continued in determining (1) whether a suspect is to be apprehended at all, (2) by which law enforcement agency the apprehension is to be made, and (3) how long the suspect is to be detained by the apprehending agency prior to arraignment. See discussion under part II, *infra*.

Anderson was based upon the Supreme Court's decision in *McNabb v. United States, supra*, and its determination was governed by the same considerations. In *McNabb* it was held that a confession secured in a two-day interval between arrest and arraignment could not be admitted in a federal criminal proceeding. The requirement of prompt arraignment is intended to protect a prisoner from intensive interrogation prior to the time a magistrate can determine whether there is any probable cause for detention and can inform the prisoner of his right to counsel and his right to remain silent. *Mallory v. United States*, 354 U. S. 449, 453-54 (1957). A federal defendant has been equally deprived of this protection whether his confession, exacted during detention prior to an arraignment, is made to a federal agent in a city, state or federal jail, or in a Tennessee Y. M. C. A.

II.

But even accepting, *arguendo*, the majority's improbable interpretation of *Anderson v. United States, supra*, I doubt that Coppola's confession was properly admitted. Contrary to what one might conclude from the statement of facts found in the majority opinion, I find many indications in the records of these two cases that Coppola's arrest by state officials would never have occurred on January 10 but for the insistence of the agent in charge of the FBI in Buffalo, and further indications that the manner of Coppola's detention on that day and night was designed, at least in part, to satisfy the desires of the FBI. In reaching this conclusion one needs to consider only the testimony of FBI agents and of officials of the Buffalo Police Department.[4]

[4] The record references cited hereafter are to the record in Docket No. 25177, the case dealing with the Manufacturers and Traders holdup.

Robbery of a bank that is a member of the Federal Reserve System is both a federal and a state crime. The robbery of the Manufacturers and Traders Trust occurred on February 15, 1956 and in the ensuing eleven months the FBI and the Buffalo police worked closely together in investigating it (R. 562-63). On January 4, 1957 the butcher shop of one Paul Redlinsky was robbed. On January 7, John Roche, agent in charge of the FBI's Buffalo office, telephoned John Golombeck, Chief of Detectives of the Buffalo Police Department, and informed Golombeck that the FBI had information that on January 4 Coppola and two others had robbed a butcher shop, proprietor unknown save for the first name "Paul" (R. 554). The Buffalo police then contacted Redlinsky. On January 8th from photographs supplied by the FBI Redlinsky identified Coppola as one of the participants in the robbery. There is no indication that any attempt was then made by the Buffalo police to arrest Coppola. On January 9th Roche personally went to Golombeck's office and informed Golombeck that the FBI possessed information that the three Redlinsky suspects intended to rob a tavern in East Buffalo on the following morning (R. 555). Immediately after this interview with Golombeck, Roche contacted John Dwyer, the District Attorney for Erie County, imparted the same information to him, and stated that Dwyer "* * * might take whatever action he desired to protect the citizens of Buffalo and to prevent, if possible, another holdup" (R. 556). Roche at that time also informed Dwyer that Coppola was suspected by the FBI in connection with the Manufacturers and Traders Trust Co. robbery of Feb. 15, 1956 and the later Liberty Bank robbery of October 2, 1956 (R. 556). From Roche's activities on the 9th it is a fair inference that the FBI desired that Coppola be taken into custody for he was an FBI suspect, but that the custody be not a federal one.

It is also a fair inference that this desire was so strong that both the Chief of Detectives of the City of Buffalo police and the Erie County District Attorney were independently informed of the impending holdup attempt. Since both Dwyer and Golombeck had been informed that Coppola was a suspect in the Manufacturers and Traders and Liberty Bank holdups, and since Coppola was indeed later interrogated by the FBI after his apprehension, one may conclude that the FBI agent-in-charge informed the state and city authorities at this very time that the FBI desired to interrogate Coppola once he had been taken into custody.

Further, the events occurring on the next day, January 10th, confirm the inference that the FBI's role in Coppola's arrest and detention was a more active role than one would surmise it to have been from the majority opinion. Between 9:30 and 9:45 A.M. Coppola and the two other suspects in the Redlinsky robbery were apprehended without warrant while driving in an automobile (R. 505). The apprehending officers were Golombeck and Harry Klenk, head of the homicide squad of the Buffalo Police Department, who seems to have participated in the arrest at Dwyer's instruction (R. 514b, 526). A subordinate police officer happened also to be present in the police vehicle (R. 535). Coppola and his companions were searched, as was their automobile, but nothing incriminating was found either in the car or on their persons (R. 530). The three were taken to Buffalo Police Headquarters, arriving at approximately 11:00 A.M. (R. 509). But shortly *before* they arrived Golombeck telephoned Roche informing him that the arrest had been made (R. 555, 563).[5] Upon arrival at headquarters,

[5] I believe that the issue of *when* the apprehending officers telephoned Roche to notify him of Coppola's arrest is of great importance. Surely if the apprehending state officers took the time to telephone the FBI agent-in-charge prior to the time these officers arrived at Police Headquarters, it is erroneous to state, as does the *in banc* majority, "The record shows that the state concentrated on its own business first."

contrary to the normal procedure whereby each prisoner upon arrival is taken to the detective bureau on the third floor for "booking," Coppola was taken directly to the cell block on the fourth floor (R. 527-29). The asserted justification for this departure from routine was the presence of newspaper photographers and television cameramen not merely on the first floor where one might reasonably expect them to be, but also upstairs on the third floor, where the detective bureau was located (R. 527-28, 536-37). After receiving Golombeck's call, Roche went to police headquarters, arriving there shortly before noon (R. 564). He was told that Coppola and his two associates had not been interrogated (R. 565). Thereupon Roche left the building to have lunch with Golombeck, Klenk, and Dwyer, their luncheon lasting until approximately 2:30 P.M. (R. 565). With Roche remaining at police headquarters (R. 565), Klenk interrogated Coppola for approximately one hour (R. 519-20). In the course of this interrogation Klenk obtained verbal permission to search Coppola's home. At approximately 3:30 P.M. Dwyer and Roche commenced a joint interrogation of Coppola. After Dwyer questioned Coppola concerning the Redlinsky robbery, Roche asked some questions concerning the Manufacturers and Traders robbery and then sought to obtain written permission to search Coppola's home (R. 557-58). Permission was re-

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Golombeck testified that he did not recall the time of this telephone call (R. 536). On direct examination Roche testified unequivocally to the following:

> "Q. What is the next contact you had with the local authorities in regard to this matter? A. On the morning of January 10th at about 11:00 o'clock or shortly thereafter Chief Golombeck called me and told me they had arrested Coppola, D'Antuono and Simmons in the vicinity of the El Chico and that they were then on their way to police headquarters with them." (R. 555.)

Roche repeated this unequivocal testimony on cross examination by Coppola's counsel. (R. 563-64.) I conclude that the telephone call occurred prior to the arrival at police headquarters.

fused, and the interrogation ended soon afterward. It was only thereafter, at approximately 3:45, that Coppola was taken down to the third floor to be booked (R. 518). And it was not until the morning of January 11 after Coppola had confessed during the night-time to the FBI agents that it officially appeared that Coppola was held by the City Police on something other than "suspicion."

From the facts recited above, I am left with the distinct impression that even as Roche was unwilling to leave the question of Coppola's arrest to the sole discretion of the Buffalo Chief of Detectives, so too he was unwilling to trust that officer to determine the course of Coppola's detention and interrogation after the arrest. I suggest that the arresting officers were instructed not to commence questioning Coppola nor even to book him until after the FBI's desires could be ascertained. I suggest further that the course of the afternoon's interrogation was determined at the meeting of Golombeck, Klenk, Dwyer and Roche at lunch, and that Roche had an important part in decisions there reached.

Thus I conclude that the FBI had a far greater role in Coppola's arrest and detention than the majority of this court is willing to state; and that the apprehension of Coppola without warrant in the morning and his detention without being booked until it was too late to arraign him that day, a conceded violation of New York State law, both demonstrate that the Federal and State officers worked out an arrangement between them so that the protection accorded federal suspects under *McNabb v. United States, supra*, could be circumvented.

Lastly, the majority would make much of the statement of Coppola's counsel made before the judge in one but not

in both of the cases which they would construe as a concession against the interest of Coppola: "I do not claim that the Buffalo police made an arrest at the behest of the

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FBI." The statement is taken out of context and was made in the heat of trial, but even standing alone it is valueless as a concession. The word "behest" is synonymous with *order* or *command* or *mandate*, and hence this purported concession still leaves untouched appellant's contention that his state apprehension and subsequent detention were at the *suggestion* and *request* of a federal officer.

I would reverse the convictions below and remand the cases for new trials.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

(Argued March 9, 1959
Original Opinion Filed July 20, 1959.)

(Reargued before the Court *en banc*, December 15, 1959
Decided May 20, 1960.)

Docket No. 25257

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

FRANK R. COPPOLA,
Defendant-Appellant.

Before:

LUMBARD, *Chief Judge,*

CLARK, WATERMAN, MOORE and FRIENDLY, *Circuit Judges.*

Appeal from a judgment of the United States District Court for the Western District of New York, Justin C. Morgan, *J.*, after a jury trial in which the defendant was convicted of violating 18 U. S. C. A. Section 2113(a) nd (b).

Affirmed.

JAMES W. KNAPP, Staff Assistant, Department of Justice, Washington, D. C. (John O. Henderson, United States Attorney, Western District of New York, Buffalo, N. Y., Leo J. Fallon, Special Assistant United States Attorney, Western District of New York, Buffalo, N. Y., on the brief), *for plaintiff-appellee.*

WILLIAM B. MAHONEY, Buffalo, N. Y., *for defendant-appellant.*

MOORE, *Circuit Judge*:

Since we have concluded this day (see *The United States of America* v. *Frank R. Coppola*, No. 25177), that there was no error in the receipt in evidence of Coppola's admissions, and since the other issues raised by Coppola's appeal are identical to those treated by Judge Waterman in his opinion affirming the convictions of Joseph Simmons and James Millio (see opinion in *The United States of America* v. *Joseph Simmons, a/k/a Joseph Synakowski, James Millio and Frank R. Coppola*, No. 25257, filed on July 20, 1959), the judgment of conviction of Frank R. Coppola is affirmed.

Clark and Waterman, *Circuit Judges*, dissent. See dissenting opinion in *The United States of America* v. *Frank R. Coppola*, No. 25177.

Appendix C

Section 2113 of the United States Code, *Crimes and Criminal Procedure*, Title 18, so far as pertinent, provides:

"§2113. Bank robbery and incidental crimes

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both;"

Rule 5. Proceedings before the Commissioner

"(a) Appearance before the Commissioner.

An officer making an arrest under a warrant issued upon a complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith."